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OCTOBER TERM, 1978

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, and JAMES T. McINTYRE, JR., DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET,
Petitioners,

v.

SIERRA CLUB, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR AMICI CURIAE NATIONAL WILDLIFE FEDERATION AND DEFENDERS OF WILDLIFE

ROBERTS B. OWEN
CHARLES H. MONTANGE
MARC B. TUCKER
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 452-6000

Attorneys for National Wildlife Federation and Defenders of Wildlife

Of Counsel:

COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006

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BRIEF FOR AMICI CURIAE NATIONAL WILDLIFE FEDERATION AND DEFENDERS OF WILDLIFE

Amici have received and filed with the Clerk of the Court letters from counsel for Petitioners and Respondents consenting to the filing of this Brief.

OPINIONS BELOW

The opinion of the Court of Appeals is set forth in Appendix A to the Petition for a Writ of Certiorari and is reported at 581 F.2d 895 (D.C. Cir. 1978). The opinion of the district court is set forth in Appendix B to the Petition for a Writ of Certiorari and is reported at 395 F. Supp. 1187 (D.D.C. 1975).

QUESTION PRESENTED

Where a Federal agency, in the course of preparing a budget request for a specific on-going program significantly affecting the environment, has conducted a painstaking reappraisal of the program or proposes to significantly change the status quo with respect thereto, is the resulting budget request a "proposal for legislation" or a "proposal for other major Federal action" so as to require the agency to prepare and consider an Environmental Impact Statement pursuant to Section 102(2)(C) of the National Environmental Policy Act (NEPA), or is the agency free to ignore the environmental aspects of the program in such circumstances?

INTEREST OF AMICI CURIAE

National Wildlife Federation ("NWF") is a nonprofit corporation organized under the laws of the District of Columbia. It is a conservation organization dedicated, *inter alia*, to the preservation of natural resources on the North American continent. NWF's total membership exceeds two million persons.

Defenders of Wildlife ("Defenders") is also a nonprofit corporation organized under the laws of the District of Columbia. It is devoted primarily to the protection and preservation of wildlife in the United States and around the world. Defenders has over 42,000 members.

The National Wildlife Refuge System, administered by the Fish and Wildlife Service of the Department of the Interior, was established for the preservation of vital habitat for the nation's wildlife and "for the management of wildlife and wildlands to obtain the maximum benefits from these resources." 50 C.F.R. § 25.11 (b). The ability of the System to meet its purposes is

largely dependent upon its funding.[1] Professional observers have pointed out that the System has perennially suffered from insufficient funds and confusion concerning its purposes.[2]

Members of NWF and Defenders engage in nonconsumptive use and enjoyment of the natural resources encompassed by the National Wildlife Refuge System. Their use and enjoyment of the System are directly affected by the manner in which environmental issues regarding the System have been considered in the budget process. Moreover, on behalf of their members NWF and Defenders regularly collect, distribute and review information concerning agency budget requests bearing upon environmental concerns, including the programs administered by the Department of the Interior and its Fish and Wildlife Service relative to the National Wildlife Refuge System. NWF and Defenders also present the views of their members with regard to the funding and direction of the National Wildlife Refuge System to public officials and to Congress. The ability of NWF and Defenders to perform these informative functions is and will be directly affected by the manner in which environmental issues relating to the System have been and will be considered in the budget process.

STATEMENT OF THE CASE

NWF and Defenders adopt the statement of the case set forth in the brief of respondents Sierra Club, *et al.*

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[1] "Improving and expanding wildlife habitat are not simple matters of buying bits of pristine paradise; most often these are overgrazed, heavily logged, drained or burned properties requiring capital investment in dams, fences, forest restoration, and other expensive rehabilitation." Doyle, *Our National Wildlife Refuges: A Chance to Grow*, 155 Nat'l Geographic 342, 348 (1979).

[2] Doyle, *supra* note 1, at 348.

SUMMARY OF ARGUMENT

1. The Government is wrong in contending that a budget request, because it is subject to rejection or modification by OMB and the President, is too "tentative" to constitute a "proposal" giving rise, under NEPA, to an obligation to prepare an Environmental Impact Statement. The whole point of NEPA is that environmental considerations should be taken into account before final decisions on Federal programs are made, and Congress itself has recognized that for Federal programs generally the budget process is the vital decision-making stage in their development. Accordingly, the court below was correct in holding that whenever a budget request encompasses a reappraisal or revision of a Federal program, it must be accompanied by the environmental analysis required by NEPA.

2. In the absence of any "clear and unavoidable conflict" between NEPA and the statutory provisions which govern the budget process, there is no justification for not applying NEPA's requirements to that process. The Government here contends that as a matter of policy the budget process should not be so burdened, but the Government's own conduct below demonstrates the feasibility of conducting a NEPA environmental evaluation in connection with budget requests and without jeopardizing the budget process in any way.

3. Contrary to the Government's contentions, a requirement that an EIS be prepared in connection with a budgetary reappraisal or revision of a program would not in any way interfere with the freedom of the President and the Executive Branch to consult together and

to make their own unfettered decisions as to where the public interest lies. NEPA requires that environmental factors be considered in the decision-making process, but it does not preclude the decision-maker, once he has considered them, from acting in contravention of the environmental interests involved. To hold that environmental impact may be entirely excluded from consideration in the budget process would be a serious blow to the purpose of the National Environmental Policy Act.

ARGUMENT

I. THE HOLDING BELOW IS COMPLETELY CONSISTENT WITH THE INTENT AND PRIOR INTERPRETATIONS OF NEPA, AND THE GOVERNMENT'S EFFORTS TO ESCAPE FROM THE LANGUAGE OF THE STATUTE ARE UNAVAILING

The Court of Appeals below held that, where a Federal agency, during the budget process, takes either one of two types of action with respect to an ongoing Federal program, it must prepare an Environmental Impact Statement ("an EIS") under NEPA. The two types of budgetary action which thus trigger an EIS obligation, according to the Court of Appeals, are: (1) a proposal to take "new action which significantly changes the status quo" of the program, 581 F.2d at 903, and (2) a "painstaking review" or "programmatic review" of the program involved. *Id.*

It should be emphasized at the outset that, judging by the legislative history of NEPA and the case law which has developed thereunder, each of these two types of action would plainly give rise to an EIS obligation if such action were taken *apart* from the budget process—and the Government's brief in this case does

not appear to contend otherwise.[3] In other words, the Government appears to concede that if either type of action is taken independent of any budget request, an EIS would have to be prepared (in order to ensure that the agency was aware of the environmental consequences of the program which it was either changing or reevaluating), but the Government nevertheless contends that if such actions take place in the context of the budget process, they somehow thereby become exempt from NEPA. That theory, we submit, cannot withstand examination.

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[3] If the Government argues that the decision of the Court of Appeals is wrong because an EIS is not required for proposals emanating from a painstaking programmatic review or for proposals to change the status quo, then the Government is incorrect. The legislative history of Section 102(2)(C) makes clear that the section was intended to apply to programmatic reviews and changes in the status quo. The Senate Report on Section 102 (2)(C) provides that EIS's are required for all "major actions, such as project proposals, proposals for new legislation, regulations, policy statements or expansion or revision of ongoing programs." S. Rep. No. 296, 91st Cong., 1st Sess. 5, 20 (1969). Moreover, this Court has already ruled that programmatic EIS's are required when an agency, after a review, adopts a "coherent plan," Kleppe v. Sierra Club, 427 U.S. 390, 400 (1976), and when an agency develops a program whose component parts have a "cumulative or synergistic" environmental impact. Id. at 409-10. The requirement of an EIS for a program, policy, or plan arising out of a programmatic review has been uniformly embraced in other decisions (*e.g.*, Environmental Defense Fund v. Adams, 434 F. Supp. 403 (D.D.C. 1977); Natural Resources Defense Council v. Hodel, 435 F.Supp. 590 (D. Ore. 1977); *see also* Natural Resources Defense Council v. Administrator, 451 F.Supp. 1245, 1258 (D.D.C. 1978)); in applicable guidelines (40 C.F.R. § 1500.6(d)(1) (1977); CEQ, Fifth Annual Report 393 (1974)) and regulations (43 Fed. Reg. 56004-05, promulgating 40 C.F.R. § 1508.18); and by commentators. *See, e.g.*, W. Rodgers, Environmental Law § 7.9 at 785-87 (1977); Note, *Program Environmental Impact Statements: Review and Remedies*, 75 Mich.L.Rev. 107 (1976).

The theory stems from the proposition that all budget requests are "tentative and provisional" (because they are subject to rejection or modification by OMB and by the President) and that anything that is that "tentative" cannot be a "proposal" within the meaning of NEPA.[4] But the intent and the words of NEPA make plain that Congress affirmatively wanted EIS's to be prepared *before* the final decision-making stage, precisely because it wanted the final decision-maker to take the relevant environmental considerations into account; thus the statute speaks of preparing EIS's in connection with "recommendations" and "proposals" in order to ensure that the environmental evaluation occurs before any final decision is made.[5] In short, every "proposal" is "tentative and provisional" by definition,[6] and an agency budget request, since it is

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[4] Brief of Petitioners at 19, *et seq.*

[5] *E.g.*, Jones v. District of Columbia Redevelopment Land Agency, 499 F.2d 502, 511 (D.C. Cir. 1974); Realty Income Trust v. Eckerd, 564 F.2d 447 (D.C. Cir. 1977). In Aberdeen & Rockfish R. Co. v. SCRAP, 422 U.S. 289 (1975), this Court indicated that an EIS was required for an agency action (there, approval of a general rate increase for railroads) even though the agency action was subject to subsequent re-consideration, review, modification, and even recision.

[6] According to Webster's New International Dictionary (2d ed. 1954, unabridged), "proposal" means:

> "1. A proposing, or setting forth for consideration; statement; as, the *proposal* of his views.
>
> "2. Something proposed for consideration or acceptance; an offer, as of terms or conditions of agreement or of marriage; a scheme, a plan, a bid, or the like, formally submitted; as to listen to the committee's *proposals;* to have had many *proposals* in her youth. . . ."

The same dictionary defines "reports" as follows:

> "2.a An account or relation, esp. of some matter specifically investigated; . . . . c. An official statement of facts, oral

the agency's proposal or recommendation to OMB and the President as to what should be done in budgetary terms, is plainly a "proposal" within the ordinary meaning of that term. By the same token, where an agency has reevaluated a program and made a budget request based thereon, or where it seeks to expand or revise the program and has requested the necessary funds, it has clearly made a "proposal" within the meaning of NEPA.

This result comports fully with the decisions of this Court dealing with what does and does not constitute a proposal for purposes of Section 102(2)(C). In *Kleppe* v. *Sierra Club,* 427 U.S. 390 (1976), the Court cautioned that an EIS requirement may not be imposed when an agency merely undertakes a study or contemplates *subsequent* development of a proposal. But a concrete budget request which an agency submits for OMB and Presidential approval is a far cry from a vague study or a mere suggestion of possible action

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or written; as, the *report* of a Committee to the Senate; d. A statement in writing of proceedings and facts exhibited by an officer to his superior; as the *reports* of the heads of departments to Congress. . . ."

Likewise, the definition of "recommendation" is given as

"1. Act of recommending. . . .

"4. A thing, course of procedure, or the like, recommended."

"Recommend" means:

"3. To commend, or bring forward explicitly, as meriting consideration, acceptance, adoption, election, or the like; to present as one's advice, one's choice or as having one's approval or support; to offer or suggest with favoring representations; as, to *recommend* a newcomer to one's friends, a defendant to the mercy of the court, the appointment of Brown to the postmasterhip. . . .

"5. To advise, counsel. . . ."

in the future; on the contrary, such a request envisions a defined level of government action (and a definite number of dollars) within the programs covered by the budget request for the fiscal year in question. Moreover, the budget request will inevitably and directly lead to a concrete decision as to the level of appropriation to be recommended to Congress. In other words, a formal budget request by an agency necessarily contains a clear "factual predicate for the production of an environmental impact statement of the type envisioned by NEPA." *Kleppe* v. *Sierra Club, supra,* 427 U.S. at 401-02. It is thus entirely appropriate to prepare an EIS in aid of such a report or recommendation on a proposal.

This conclusion is consistent with the purposes of NEPA. NEPA and other environmental statutes are designed to generate a "meaningful consideration and balancing of environmental costs against economic and other benefits." *Scientists' Institute for Public Information* v. *AEC,* 481 F.2d 1079, 1089 (D.C. Cir. 1973). The intent is to bring to light and focus attention on the environmental costs of a proposed undertaking before it is "too late to adjust the formulated plans so as to minimize adverse environmental effects." *Lathan* v. *Volpe,* 455 F.2d 1111, 1121 (9th Cir. 1971).[7] Accordingly, as noted above, NEPA requires consideration of environmental issues in the decision-making process *before* decisions are made and actions taken.[8]

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[7] *See also* Environmental Defense Fund v. TVA, 468 F.2d 1164, 1181-82 (6th Cir. 1972); City of Davis v. Coleman, 521 F.2d 661, 670 (9th Cir. 1975); Natural Resources Defense Council v. Callaway, 524 F.2d 79, 92 (2d Cir. 1975); Citizens Against Toxic Sprays, Inc. v. Bergland, 428 F. Supp. 908, 933 (D. Ore. 1977).

[8] *See* 43 Fed. Reg. 55990-92 (Nov. 29, 1978), promulgating 40 C.F.R. § 1500.1-.2 and § 1501.1-.3 (new CEQ regulations).

If environmental concerns are to be meaningfully addressed at all in the budget process, they must be considered by the time the agency submits its budget request to OMB.[9] Once such a budget request has been incorporated into the President's budget and transmitted to Congress, it is simply too late for the Executive Branch to effect alterations or modifications in the budget to accommodate environmental concerns and minimize adverse environmental impact.

Moreover, if the preparation of an agency budget request entails a reevaluation or a revision of an ongoing agency program, the simultaneous preparation of an EIS will obviously serve a useful purpose. In such circumstances the EIS will not only inform agency decision-makers of the environmental consequences of their new plan of action, but it will also inform OMB and the President of the consequences of funding the program at the level recommended in

[9] *See* H. Rep. 93-697, 93d Cong., 1st Sess., 6-7 (1973) ("The decisions of the Director of the Office of Management and Budget are in most instances the final Executive Branch decision on budget requests and on the legislative policy of the Executive Branch. . . . The Office of Management and Budget stands at the center of Federal policy-making with life and death decisions about programs and procedures.").

The two possible points for requiring an EIS in the budget context are at the time an agency budget request is forwarded to OMB, and at the time the President forwards the budget to Congress. The government suggests that the President is not an "agency" for purposes of NEPA and need not comply with the EIS requirement (which by its terms applies only to an "agency") at the time the budget is "proposed" to Congress. Brief of Petitioners at 31-32 n. 22. If this is so, then the agency budget request to OMB and the President is the only "proposal" by an agency for purposes of NEPA and, as such, clearly should be accompanied by an EIS.

the agency's budget request.[10] In addition, apart from promoting informed executive decision-making, the EIS will also provide both Congress and the public with valuable information of direct relevance to the appropriation process.[11] That being so, it is hard to take seriously the Government's suggestion that the holding below somehow tends to "trivialize" NEPA.[12]

In fact, NEPA would be "trivialized" only if it were not applied where it is applicable, and the types of decisions involved in the budget process are quite

[10] In its brief to the Court of Appeals below the Government admitted the general utility of a programmatic statement. The Government said,

> "The Programmatic EIS, instead of being tied to the evolving formulation of particular proposals for annual or supplemental appropriations for a given fiscal year, describes the environmental impacts of alternative dollar levels of funding the National Wildlife Refuge System. It is thus useable and reusable for informed decisionmaking throughout several fiscal years in connection with both budgetmaking and after the enactment of congressional appropriations, the control and timing of expenditures." Brief of the Appellants at 32.

The Government also stated:

> "The Programmatic EIS is . . . the best solution for Interior to address 'proposals' in annual Budgets over which Interior lacks decisive control and which are the product of recommendations made at successive steps prior to appropriations . . . and at successive steps after appropriations during the phase of budget execution . . ." Brief of the Appellants at 63.

In the Government's view, a programmatic EIS would not only serve decision-makers in the budget process but would also assist decision-makers in making spending decisions after a budget has been finally adopted.

[11] *See* Realty Income Trust v. Eckerd, 564 F.2d 447, 453-54 (D.C. Cir. 1977); Atchison, T & S.F. Ry. Co. v. Callaway, 431 F. Supp. 722, 727 (D.D.C. 1977).

[12] Brief of Petitioners at 46.

clearly of the kind to which NEPA should be applicable. Indeed, Congress itself recognizes that for any given Federal program the vital decision-making takes place as part of the budget process. In the words of the House Committee on Government Operations,

> "The Office of Management and Budget stands at the center of Federal policy-making with life and death decisions about programs and procedures. The budget is the great judgment book for Federal agencies and activities, recording which shall live and which shall die, which shall prosper and which shall wane. Unlike the situation 50 years ago, when the mix of Federal activities varied little from year to year, the budget now is the 'action forcing' process, involving new program decisions and billions of dollars each year." H. Rep. No. 93-697, 93d Cong., 1st Sess. at 7 (1973).[13]

Given the importance of the budget process in formulating national policy and programs, we submit, it would be very surprising indeed if it were somehow exempt from Section 102(2)(C), the central "action forcing" mechanism of NEPA,[14] our "basic national charter for protection of the environment."[15] Recognizing this fact, those courts which have considered the question have refused to exempt the budget process

[13] *See also* A. Wildavsky, The Politics of the Budgetary Process 2 (2d ed. 1974) ("Since funds are limited and have to be divided in one way or another, the budget becomes a mechanism for making choices among alternative expenditures").

[14] Calvert Cliffs' Coordinating Committee, Inc. v. USAEC, 449 F.2d 1109, 1113 & n.17 (D.C. Cir. 1971) (collects legislative history); W. Rodgers, *supra* note 4, § 7.4 at 725; *see* 43 Fed.Reg. 55990 (Nov. 29, 1978); *promulgating* 40 C.F.R. § 1500.1 (new CEQ regulations).

[15] 43 Fed. Reg. 55990 (Nov. 29, 1978), promulgating 40 C.F.R. § 1500.1 (new CEQ regulations).

from NEPA and instead have squarely held that Section 102(2)(C) applies to agency budget requests.[16]

In an effort to escape the foregoing holdings, the Government's brief devotes a great deal of attention to the proposition that an agency budget request, even if it seeks appropriations based upon a complete reappraisal of a Federal program or a change in the status of the program, is not a "proposal for legislation" within the meaning of Section 102(2)(C). We respectfully submit, however, that such argumentation, even if it were correct, would not support the conclusion advocated by the Government for the simple reason that such a budget request is plainly a "recommendation or report on a proposal for major Federal action", and any such recommendation or report triggers an EIS obligation, whether or not a "proposal for legislation" is involved. After all, any budget request of the kind described above in effect embodies the agency's plan of action for the fiscal year in question, and if the contemplated action is major and affects the environment, NEPA plainly requires the preparation of an EIS.

Finally, if NEPA in fact were ambiguous with respect to requiring an EIS for the two types of budget requests at issue here (*see* page 5, *supra*), any doubts would have to be resolved in favor of the application of NEPA. The statute itself calls for compliance "to the fullest extent possible," and the legislative history

[16] *E.g.*, Scientists' Inst. for Public Information, Inc. v. AEC, 481 F.2d 1079, 1088 (D.C. Cir. 1973); EDF v. Froehlke, 348 F. Supp. 338, 364 (W.D. Mo. 1972), *aff'd*, 477 F.2d 1033 (8th Cir. 1973); EDF v. TVA, 339 F. Supp. 806, 811 (E.D. Tenn), *aff'd*, 468 F.2d 1164, 1181 (6th Cir. 1972); Aluli v. Brown, 437 F. Supp. 602 (D. Haw. 1977).

is in full accord. The House conferees on NEPA explicitly stated that no Federal agency was to rely upon "an excessively narrow construction of its existing statutory authorizations to avoid compliance" with NEPA, 115 Cong. Rec. 39703 (1969), and this Court itself has emphasized that the obligations imposed by NEPA must "not be shunted aside in the bureaucratic shuffle." *Flint Ridge Development Co.* v. *Scenic Rivers Association of Oklahoma,* 426 U.S. 776, 787 (1976). Since the two actions encompassed within the holding below—the reappraisal and/or revision of a Federal program—would plainly require the preparation of an EIS if the responsible agency involved were not dealing with another agency (OMB) in the budgetary process, obviously they should not be immunized from NEPA's requirements merely because a second agency (OMB) is to be the recipient of the reappraisal or revision involved. *See* note 5 *supra.*

II. REQUIRING AN EIS FOR AGENCY BUDGET REQUESTS WHERE THOSE REQUESTS ARE BASED UPON PROGRAM REAPPRAISALS OR REVISIONS WOULD NOT BE INCONSISTENT WITH THE BUDGET PROCESS

Given the clear command of NEPA and the importance of taking environmental considerations into account in reappraising or revising existing Federal programs, there would seem to be only one way in which the Government could succeed in avoiding the preparation of an EIS in connection with a program reappraisal or revision incorporated in an agency budget request—namely, by showing "a clear and unavoidable conflict" between the requirements of NEPA and the requirements of another applicable statute. *Flint Ridge Development Co.* v. *Scenic Rivers Association of Oklahoma, supra,* 426 U.S. at 788. In fact, since no such conflicting statute exists, it would seem that NEPA necessarily applies in precise accordance with the decision below.

With no statutory conflict available, the Government brief has fallen back upon a far less persuasive approach. The theory is simply that it would be highly inconvenient for Government agencies to comply with the decision below because, says the Government, an EIS could be prepared in the budget process only through "Herculean" efforts [17] and because "it is at least questionable if there is time in the budget cycle" to prepare an EIS.[18]

This line of argumentation is unpersuasive, not only because administrative inconvenience can hardly justify a departure from an affirmative statutory command but also because the inconvenience argument is factually undermined by the contentions made by the Government below. In the Court of Appeals the Government did not allege that the EIS requirement (particularly of the programmatic kind) would be unduly burdensome; on the contrary, the Government advised the court that it would be quite acceptable to require the preparation of programmatic EIS's as part of and in aid of the budget process:

> "In view of the multitudinous occasions which might or might not qualify as 'proposals for legislation and other major Federal actions significantly affecting the quality of the human environment' under NEPA, the use of a single Programmatic EIS for the vast number of such separate occasions, instead of separate EISs tailored to each

[17] Brief of Petitioners at 48.

[18] Brief of Petitioners at 46.

> single occasion, cannot be said to lack a 'reasonable basis in law.' [Citations omitted.] *The Programmatic EIS is thus an acceptable method of complying with NEPA in the circumstances of annual budget making.*" Brief of Appellants at 33 (emphasis added).

It seems entirely contradictory for the Government now to argue that when the Court of Appeals called for the preparation of a programmatic EIS in connection with the budget process, it was thereby imposing an unacceptable burden on the budget process.

Moreover, the Department of the Interior's own actions in this case belie the suggestion in the Government's brief. Interior has already prepared a programmatic EIS covering, among other things, alternative funding levels for the National Wildlife Refuge System, and the Government represented to the Court of Appeals that this EIS complied with any applicable NEPA requirement. *See* Brief of Appellants at 32. The fact that Interior, as part of the budget process, was able to prepare such an EIS in order to comply with NEPA seriously undercuts the Government's arguments as to the difficulty of compliance.[19]

In any event, the requirements of NEPA may be shaped to comport with any actual necessities of the budget process. Even if existing regulations or guidelines interpreting NEPA called for procedures or detail raising time or manpower problems within the budget cycle, new regulations tailoring the require-

[19] In its brief below the Government acknowledged that one agency within the Department of the Interior (the Bonneville Power Administration) even prepares a specific EIS in connection with its annual appropriation requests. Brief of Appellants at 16 n.6.

ments of Section 102(2)(C) to eliminate any actual conflicts with budget necessities could easily be devised and promulgated.[20] NEPA may readily be applied in a fashion which satisfies any legitimate needs of the budget process with regard to timing and similar concerns.[21]

[20] CEQ has already established two quite different basic procedures governing EIS's for proposed legislation and EIS's for proposed federal action. Under the CEQ regulations an agency proposing federal action generally must prepare a "draft" EIS which is circulated to the interested public and then revised into a final version in accordance with comments received. In contrast, no draft EIS (and, consequently, no pre-issuance circulation to the public) is required for proposals for legislation. *See* 43 Fed. Reg. 56001-02, promulgating 40 C.F.R. § 1506.8. The Government, on investigation, might find CEQ's new regulations fully compatible with the budget process, whether budget requests were placed in the "legislation" or "major Federal action" categories. It bears noting that the Government has not argued that the new CEQ regulations, if applied in the budget process, would necessarily be incompatible with that process. *See also* Aberdeen & Rockfish R. Co. v. SCRAP, 422 U.S. 289, 322 (1975).

[21] In any event, contrary to the Government's contention, the effort required to prepare a suitable EIS to accompany a budget request is far from "Herculean." The new CEQ regulations provide that EISs shall ordinarily be less than 150 pages. 43 Fed. Reg. 55995, promulgating 40 C.F.R. § 1502.7. The basic alternatives to be examined in an EIS on a budget request are simple. They could be limited to the alternative of the previous year's level of funding, a somewhat higher level of funding, a somewhat lower level, no funding at all, and the agency's recommended level of funding if different from the foregoing. *See, e.g.*, Hearings Before Subcomm. of Fisheries & Wildlife Cons. & the Environment of House Comm. on Merchant Marine & Fisheries, 94th Cong., 1st Sess., at pp. 170-79 (1975) (discussion of application of Section 102(2)(C) to budget requests). Since the budget process is largely incremental without substantial change from year to year (at least in real as opposed to current dollar terms), most agencies whose budget request requires an EIS may be able to satisfy Section 102(2) by preparing a single assessment, to be

The Government also argues that application of Section 102(2)(C) to agency budget requests would be inconsistent with the confidentiality of the budget process,[22] but again the argument seems inconsistent with the facts of this case. As noted above, the Department of the Interior has already prepared a programmatic EIS discussing alternative levels of funding for the National Wildlife Refuge System, and the Government represented to the court below that the EIS satisfied all the demands of NEPA in the budget process. At no time did the Government contend below that its preparation of the programmatic EIS had run afoul of budgetary confidentiality considerations.

The Government's main contention with respect to confidentiality appears to be that an agency budget request cannot properly be disclosed until the President's budget is transmitted to Congress. Assuming *arguendo* that an agency has a legal right to maintain the secrecy of its budget request until the President's budget is transmitted,[23] it is readily demonstrable that Section

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supplemented or simply referred to, in following years. *Compare* A. Wildavsky, The Politics of the Budgetory Process 14-15 (2d ed. 1975) (budgets are largely incremental and many expenditures are not reviewed and remain unchanged from year to year) *with* Aluli v. Brown, 437 F. Supp. 602, 612 (D. Haw. 1977) (budget request EIS may simply be an "updated version").

[22] Brief of Petitioners at 29-30.

[23] The Government appears to rely upon the Budget and Accounting Act of 1921 as requiring confidentiality. In fact, however, neither that statute nor its legislative history provide any hint that budget preparation was intended to be cloaked in "confidentiality." The Act merely provides that the President submit the federal budget to Congress each year (31 U.S.C. § 11) and that budget requests not be submitted to Congress "by an officer or employee of any department or establishment, unless at the

102(2)(C) is compatible with that right and does not in fact require inappropriate disclosure. Specifically, a programmatic EIS of the kind contemplated by the decision of the Court of Appeals would normally address funding alternatives over a number of years and would be general in its terms rather than specific. Although it would provide valuable information for evaluating a particular request and alternatives, there is no reason why any specific budget request could not be reflected in the EIS as only one of several possible alternatives. The new CEQ regulations are consistent with this approach. They provide that a specific budget request need not be set forth in an EIS as the agency's preferred alternative if "another law prohibits the expres-

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request of either House of Congress." 31 U.S.C. § 15. Any requirement of confidentiality appears to result solely from guidelines and bulletins issued by OMB and its predecessors. But NEPA provides that any agency must interpret its authorizing statute in a fashion which is consistent with NEPA if at all possible. The Government has not demonstrated that the budget process would be incapacitated if agency budget requests to OMB were disclosed, assuming, *arguendo*, that NEPA requires such disclosure.

NWF and Defenders do not understand the Government to be arguing that application of NEPA to agency budget requests conflicts with the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (*see* Brief of Petitioners at 50), nor could the Government so argue. Even if the FOIA were deemed an "authorizing statute" which, for purposes of Flint Ridge Development Co. v. Scenic Rivers Association of Oklahoma, 426 U.S. 776 (1976), could override NEPA in cases of unavoidable conflict, there is no possible conflict. The exceptions to disclosure provided in FOIA are permissive, not mandatory. *E.g.*, Pennzoil v. FPC, 534 F.2d 627 (5th Cir. 1976). Since the exceptions (if otherwise applicable at all) are only permissive and therefore do not bar disclosure, they cannot preclude disclosure of information the publication of which is required by another statute (including NEPA).

sion of such a preference." [24] Moreover, under the new CEQ regulations, if the budget request were treated as, or analogized to, a proposal for legislation, the EIS need not be made available to Congress or to the public until after the President's budget is submitted to Congress.[25]

The Government's brief also claims that disclosure of EIS's accompanying budget requests would "fragment the development of the presidential budget in a manner contrary to the intentions and requirements of the Budget and Accounting Act . . . ."; indeed, the brief makes the extraordinary assertion that such disclosure would lead to "the political fragmentation of the President's cabinet and Administration . . . ." [26] That thought, however, is hard to follow. The Budget and Accounting Act simply directed the President, with the assistance of a Bureau of the Budget (now supplanted by OMB), to coordinate agency budget requests and thus to centralize preparation of a national budget.[27] But the preparation of an EIS in aid of budget requests, as required by the decision below, does not pose any threat either to budget centralization or to any other requirement of the Budget and Accounting Act. Since the application of NEPA does not conflict with any statutory authority governing the budget process, the holding below is correct.

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[24] 43 Fed. Reg. 55996, promulgating 40 C.F.R. § 1502.14(e).

[25] *See* 43 Fed. Reg. 56001-02, promulgating 40 C.F.R. § 1506.8.

[26] Brief of Petitioners at 51.

[27] *See* H. Rep. No. 14, 67th Cong. 1st Sess., p.4 (1921) (details problems with pre-1921 budget procedures).

III. APPLICATION OF SECTION 102(2)(C) DOES NOT THREATEN, MUCH LESS INFRINGE, ANY EXECUTIVE BRANCH INTERESTS OF CONSTITUTIONAL DIMENSIONS

The Government contends that application of NEPA in the budget process would infringe on prerogatives that the Executive Branch enjoys under the Constitution. It is argued, for example, that requiring an EIS in connection with budget requests to be submitted to Congress "would risk breaching the separation of powers doctrine, and potentially infringing upon the President's constitutional power to present recommendations for legislation to the Congress." [28]

The argument is plainly without merit. Congress is entrusted with "All legislative Powers," [29] including the power to appropriate moneys [30] and to investigate

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[28] Brief of Petitioners at 31-33 n.22.

[29] Constitution, Article I, Section 1.

[30] Congress plainly has plenary powers in the budget process. The Constitution refers to appropriations twice, both in portions of Article I delineating Congress' legislative powers. In the exercise of its power to appropriate, Congress generally dealt directly with the agencies with regard to their budget requests until 1921. *See* L. Fisher, Presidential Spending Power 9-55 (1975). The Budget and Accounting Act, enacted to afford Congress a more coordinated set of agency proposals with which to deal, was not viewed by Congress as diminishing or denying its power over appropriations. *See* H. Rep. No. 14, 67th Cong., 1st Sess. p. 7 (1921). Congress understands itself to have preeminent power with regard to appropriations. As stated by the House Government Operations Committee,

> "Budget-making, a Presidential responsibility, is prescribed by law, not by any inherent right of office. . . . The concept [is] that the budget should be a tool of congressional funding decisions and spending controls. The President was given a statutory requirement to provide the Congress with a budget, and the Bureau of the Budget was given a statutory

and to obtain such information as may be necessary to exercise the power to legislate (and appropriate) in an intelligent fashion.[31] Similarly, Congress can unquestionably require the Executive Branch to assemble and disclose (*e.g.*, in an EIS) any and all information supporting—or not supporting—a "recommendation" of the Executive Branch to Congress.[32]

It is also urged that requiring agencies to submit EIS's with their budget requests poses possible "constitutional difficulties" under the Opinion Clause, which provides that "the President . . . may require the Opinion . . . of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices . . . ." [33] But requiring agencies to consider certain kinds of information in reaching decisions, or even to give more or less weight to

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responsibility to assist in its preparation. This chain of requirements puts the Bureau firmly at the service of Congress, an obligation which has been honored for half a century. . . ." H. Rep. 93-697, 93d Cong., 1st Sess. pp. 2&6 (1973).

[31] *See* Eastland v. United States Servicemen's Fund, 421 U.S. 491, 504 (1975). ("the power to investigate is inherent in the power to make laws because '[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change.' McGrain v. Daugherty, 273 U.S. 135, 175 (1927)").

[32] The Government's argument that constitutional problems are posed by EIS's in the budget context is belied by the fact that EIS's are required on legislative proposals (43 Fed. Reg. 56001, promulgating 40 C.F.R. § 1506.8), and the Government does not appear to dispute this requirement. Budget requests, at least for the purposes involved here, are not distinguishable from legislative proposals.

[33] Brief of Petitioners at 32, citing Constitution, Article II, Section 2, Clause 1.

certain factors, is hardly an infraction of the Opinion Clause. Clearly, Section 102(2)(C), which only establishes a procedure for ensuring that agencies consider certain factors in formulating their "opinions" or proposals,[34] does not infringe on the Opinion Clause. Under this Section, once those factors have been brought to the agencies' attention, the agencies are free to form any opinions they want. It is nothing short of ludicrous to suggest that NEPA unconstitutionally interferes with the formulation and communication of opinions within the Executive Branch.[35]

Finally, the Government claims that constitutional questions would arise "*if* Congress were to enact legislation restricting the President's ability to exercise his discretionary political judgment in the preparation of the presidential Budget." [36] That may or may not be so, but NEPA is certainly not such a piece of legislation. Again, NEPA does not "restrict" the President's ability to exercise his political judgment; it only establishes a procedure to require agency consideration of the environmental consequences of their acts. Since NEPA itself does not preclude the President or an agency from acting in contravention of environ-

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[34] TVA v. Hill, 437 U.S. 153, 188 n.34 (1978).

[35] The Government may have intended to suggest that NEPA obligations might delay an agency in forwarding its "opinion" to the President, thus infringing on the Opinion Clause. But this concern would appear equally applicable to "opinion" on legislation, about which the Government does not suggest constitutional concerns. Moreover, CEQ has not had difficulty in providing for expedited procedures relating to EIS's in the legislative context. And more importantly, an agency may provide its "opinion" to the President quite freely. It must comply with NEPA only in the context of a report or recommendation on a proposal for legislation or major Federal action.

[36] Brief of Petitioners at 50 (emphasis added).

mental concerns, it plainly does not restrict the exercise of Presidential judgment in any way at all.

The simple fact is that the Government has gone to extraordinary lengths to conjure up constitutional objections to the decision below and has totally failed in the endeavor.

CONCLUSION

The decision of the Court of Appeals below should be affirmed.

Respectfully submitted,

ROBERTS B. OWEN
CHARLES H. MONTANGE
MARC B. TUCKER
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 452-6000

Attorneys for National Wildlife Federation and Defenders of Wildlife

Of Counsel:

COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006